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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002482-MR

HARRIS G. WHITE, JR.;
HAROLD J. MCLAUGHLIN
LORI PRICE; PAUL PRICE; AND
DINGLEY DELL, INC. APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, SENIOR JUDGE
ACTION NO. 05-CI-01364

CITY OF HILLVIEW, KENTUCKY;
THE CITY COUNCIL OF HILLVIEW, KENTUCKY;
(HARRY L. COOPER, LEEMON POWELL, JAMES
A. BURTON, WANDA MORGAN, JO-ANN WICK,
MIKE MCINTOSH, AND JOHN D. RUSS);
BULLITT COUNTY JOINT PLANNING COMMISSION;
SALT RIVER ELECTRIC COOPERATIVE CORPORATION;
AND (BY INTERVENTION) SABERT CORPORATION APPELLEES

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: Appellant landowners appeal from decisions of the Bullitt Circuit Court ultimately affirming an action by the City Council of Hillview to

approve the rezoning of approximately 75.25 acres of land on East Blue Lick Road in the City of Hillview, Bullitt County, Kentucky. The property was owned by the Salt River Electric Corporation ("Salt River"), and was rezoned from R-2 [residential] to IL [light industrial]. The appeal represents the consolidation of two actions, No. 05-CI-01314 and No. 06-CI-00790. For the reasons herein, we affirm.

BACKGROUND

Salt River, the property owner, purchased the property in January, 2005. Shortly thereafter, the property was annexed into the City of Hillview. Subsequently, Salt River filed an application for rezoning of the property from R-2 to IL. After a public hearing on October 27, 2005, the Planning Commission issued a recommendation on November 1, 2005, that the request be denied. The Planning Commission found that the requested rezoning change was not in compliance with the Comprehensive Plan, which suggested Low Density Suburban Residential for the property.

On November 21, 2005, the Hillview City Council ("City Council") held a public hearing on the proposed rezoning of the Salt River property. Ordinance 2005-18, which represented the rezoning proposition, was approved at a special meeting of the City Council on November 22, 2005.

On December 20, 2005, the Appellants, Harris G. White, Harold J. McLaughlin, Paul and Lori Price, and Dingley Dell, Inc., (adjoining landowners to the Salt River property) filed an action [No. 05-CI-01364] for judicial review of the City Council's approval of the ordinance. Based on Kentucky Revised Statutes

(KRS) 100.347(3), they are the proper parties to this suit. Appellants filed the action against the City of Hillview, the City Council, the Planning Commission, and Salt River. Later, on February 13, 2006, the Sabert Corporation ("Sabert") was allowed to intervene as a defendant because it had given Salt River a letter of intent to purchase the rezoned property to build a plastics plant.

Appellants' complaint stated that the City Council had failed to make the required factual findings when it rejected the Planning Commission's recommendation, rezoning did not comply with the comprehensive plan, the City Council was illegally constituted at its November 22, 2005, meeting, and the adoption of Ordinance 2005-18 was arbitrary, capricious, and unsupported by the record.

In its June 12, 2006, Opinion and Order, the court found that the City Council had not set forth appropriate findings of fact as required by KRS 100.213. The court then set aside Ordinance 2005-18 and remanded the matter to the City Council. Furthermore, the court's order stated that, if the City Council again approved the requested zoning change for the Salt River property, it was to make the necessary findings of fact.

Consequently, on June 19, 2006, the City Council re-passed Ordinance 2005-18 and incorporated specific findings of adjudicative facts, adopted and approved by the City Council. Thereafter, Sabert Corporation, City of Hillview and Salt River individually filed motions, which moved the court to either dismiss Appellants' appeal, to reconsider the re-passage of Ordinance 2005-18,

and/or to affirm the rezoning of the property. Appellants filed objections to the Appellees' motions including a motion to find the re-enacted Ordinance 2005-18 as invalid because it was in violation of the ninety-day period set out in KRS 100.211(7). Salt River and Sabert filed replies on July 7, 2006, as did the City Council on July 10, 2006, stating that there was no violation of KRS 100.211(7).

At this point, on July 18, 2006, Appellants also filed another complaint (No. 06-CI-00790) for judicial review of the matter. Next, the City of Hillview and their City Council filed a motion on July 21, 2006, that because the complaint involved the same parties and issues already before the court in No. 05-CI-01364, that for the sake of judicial economy and because re-litigating the issues in the action would be *res judicata*, the action should be dismissed. Salt River filed a similar motion on July 28, 2006, moving for the action to be dismissed on the basis of *res judicata*.

On August 23, 2006, the circuit court affirmed Ordinance 2005-18 as approved by the Hillview City Council on June 19, 2006, and also in a separate order dismissed the appeal in No. 06-CI-00790.

On September 5, 2006, Appellants filed a motion to amend the court's August 23, 2006, decision pursuant to Kentucky Rules of Civil Procedure (CR) 52.02, 59.05, and 60.02, along with a motion to amend their complaint on appeal. Next, on September 22, 2006, the court granted the Appellants' motion to consolidate No. 05-CI-01364 with No. 06-CI-00790. The court entered an Opinion

and Order on November 1, 2006, denying Appellants' CR 59.05, 52.02, and/or 60.02 motions, and the motion to file a first amended complaint.

Appellants' CR 52.01, 52.02, 59.05, and 60.02 Motions and the Motion to File a First Amended Complaint

The Kentucky Rules of Civil Procedure (CR) govern the time within which parties are required to file motions. CR 6.02 allows the court discretion in expanding the time limit for motions except "it may not extend the time for taking any action under Rules 50.02, 52.02, 59.02, 59.04, 59.05, 60.02, 72.02, 73.02, and 74 except to the extent and under the conditions stated in them."

CR 52.02 states:

> Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than **10 days after entry** of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. (Emphasis added.)

And, CR 59.05 states:

> A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than **10 days after entry** of the final judgment. (Emphasis added.)

The Opinion and Order entered on August 23, 2006, was a final judgment. Appellants filed their CR 52.02 and 59.05 motions on September 5, 2006. This date was thirteen days after the entry of the final judgment. Both CR 52.02 and 59.05 mandate that motions be filed within ten days after entry of the final judgment. Appellants argue that their motions met the ten-day time limit

because of the time computation allowed under CR 6.01. But, CR 6.02, as cited above, removes from its operation the time limits for certain motions, including motions to amend the court's findings (CR 52.02), motions to alter or amend a judgment (CR 59.05), and motions for relief from judgment (CR 60.02). Thus, the Appellants' motions were due on September 2, 2006.

In addition, as the circuit court noted when it referred to *Arnett v. Kennard*, 580 S.W.2d 495 (Ky. 1979), CR 6.02, and CR 6.05 do not apply to the ten-day time limit prescribed by CR 59.05. CR 6.05 applies only to periods measured by date of service. *Id.* at 496. Likewise, the ten-day period under CR 52.02 runs from the entry of the judgment. Therefore, the Appellants' motions to alter, amend, or vacate pursuant to CR 52.02 and 59.05 are untimely and cannot be considered by the court.

The decision whether to grant a CR 60.02 motion is left to the sound discretion of the trial court. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994). With regards to the Appellants' argument under CR 60.02(b) newly discovered evidence, the trial court found it was not applicable in this action. CR 60.02(b) states:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds . . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02.

In its November 1, 2006, Opinion and Order, the circuit court ascertained that the "newly discovered" evidence relied upon by the Appellants for this motion was the court's August 9, 2006, order in No. 05-CI-01319 and the minutes of the June 19, 2006, Hillview City Council meeting. The court reasoned that, because the Appellants were aware of this "newly discovered" evidence and could have made a timely CR 59.05 motion, CR 60.02(b) cannot be used here for evidence that does not meet the criteria of "newly discovered." We agree with the circuit court and find it did not abuse its discretion in denying Appellants' CR 60.02(b) motion.

Pertaining to the Appellants' assertion that the circuit court erred in failing to address Appellants' motion under CR 52.01 in action No. 06-CI-00790, and make specific findings of fact, and state separately conclusions of law, we begin our discussion with the procedural actions. When it dismissed the action on August 23, 2006, the court's dismissal was based on Appellees' motions that the second action was contrary to judicial economy and *res judicata*. *Res judicata* prevents parties, involved in a prior action, from re-opening final judgments, and hence, promotes judicial economy. Applying *res judicata* in zoning matters is left to the discretion of the court and the basis for applying discretion is to thwart repeated and harassing applications to rezone the same real property. *Fiscal Court of Jefferson County v. Ogden*, 556 S.W.2d 899 (Ky. 1977) (*overruled on other grounds in Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982)).

Here, we agree with the trial court that the case had already received a final judgment in the initial action and that the second action was based on the

same action and parties. Thus, the court does not have to make findings of fact and conclusions of law when it had already done so in the original case.

Finally, the Appellants moved herein to file a first amended complaint and include the allegations contained in the complaint for No. 06-CI-00790 and the allegation that Salt River violated KRS Chapter 279 contained in yet another action, No. 05-CI-01319. The discretion to amend under CR 15.01 shall be given when justice so requires; however, the decision rests with the sound discretion of the trial court. This decision will not be disturbed absent an abuse of discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky.App. 2000). The trial court determined that the Appellants' request for leave to amend must be denied because final judgment in No. 05-CI-01314 had been entered on August 23, 2006. Furthermore, the court decided that the allegations from No. 05-CI-01319 were the subject of other actions and were already considered.

Now we will address several miscellaneous issues in the Appeal. First, Appellants proffered that the Hillview City Council violated KRS 83A.060(4) when it adopted Ordinance 2005-18 on June 19, 2006. KRS 83A.060(4) requires, except in emergency actions, that no ordinance shall be enacted until it has been read on two separate days. The Appellants provided a copy, for several different dates, of Business Minutes for the City of Hillview Council meetings. They contain the following record of the proceedings:

November 21, 2005 Business Meeting Minutes

> Mayor Eadens then introduced the First Order of Business, which was the First Reading of City of Hillview Ordinance 2005-18, an ordinance relating to the rezoning of certain property within the boundaries of the City of Hillview . . . .
>
> November 22, 2005 Business Meeting Minutes
>
> Mayor Eadens then called for the next order of business, which was the second reading of the City of Hillview Ordinance 2005-18 . . . .
>
> June 19, 2006 Business Meeting Minutes
>
> Mayor Eadens called for the first order of business . . . . The second reading was required by the order of Judge Ryan who is the presiding judge on the lawsuit filed by the [sic] Mr. Conway and Mr. White against the Salt River Electric Cooperative.

Therefore, the minutes of the City Council demonstrate clearly that the Ordinance was given its second reading.

Second, Appellants claim that the June 19, 2006, Minutes do not meet the statutory requirement of KRS 100.213, which provides:

> (1) Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one (1) or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court;
>
> (a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate;

> (b) That there have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.

Yet, the record is apparent. The Planning Commission held a hearing [first public hearing] on October 27, 2005, and made a pro forma recommendation denying the zoning change for this property because, in their opinion, it was not in compliance with the comprehensive plan. Subsequently, the matter went before the Hillview City Council, where it had its first reading on November 21, 2005, and a hearing (second public hearing) with the evidence presented at the Planning Commission and additional evidence and testimony. On November 22, 2005, the Hillview City Council adopted the Ordinance without incorporating the findings of fact from the previous night's hearing. Appellants then filed the first action for judicial review.

On June 12, 2005, the court remanded the matter to the City Council for adjudicative findings on the record should they again re-adopt the Ordinance. On July 19, 2005, the City Council had another meeting, another reading of the ordinance, adopted the adjudicative facts into the minutes, and re-passed the Ordinance. Hence, they did meet the necessary statutory requirements.

JUDICIAL REVIEW

The standard of review before the circuit court and before this Court is the same. Judicial review of the acts of an administrative agency is concerned with the question of arbitrariness. In the seminal decision, *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379

S.W.2d 450 (Ky. 1964), the Court held that "judicial review of administrative action is concerned with the question of arbitrariness." Three grounds exist for finding an agency's decision was arbitrary: (1) whether the action was in excess of the granted powers of the agency; (2) whether there was a lack of procedural process; and (3) whether there was a lack of substantial evidentiary support for the administrative decision. *Id.* at 456.

In the final analysis, all these issues may be reduced to the ultimate question of whether the action taken by the administrative agency was arbitrary. In *American Beauty Homes Corp.,* the Court reasoned that the yardstick of fairness is sufficiently broad to measure the validity of administrative action. *Id.* at 457. Furthermore, as a general rule, the decision regarding rezoning of a parcel of real property is not a judicial function, and our review is thus limited to whether a legislative body acted in an arbitrary manner in reaching a zoning decision. We will now address the issues determinative of arbitrariness.

1. Did the City Council act within its statutory authority?

Zoning is a statutory creation. Zoning is authorized under Chapter 100 of the Kentucky Revised Statutes. Bullitt County and the City of Hillview have adopted a joint Planning Commission, and by this adoption, the City of Hillview and the Fiscal Court of Bullitt County have adopted the provisions of Chapter 100. In Kentucky, local legislative bodies have the ultimate authority to decide re-zoning cases. *See* KRS 100.211. In the instant case, the zoning request followed the procedure set out in the Kentucky Revised Statutes.

And, in *Hougham v. Lexington-Fayette Urban County Government*, 29 S.W.3d 370 (Ky.App. 2000), the Court held that a local legislative body has the final authority on zoning changes. Therefore, the City Council acted within its statutory authority when granting the re-zoning request.

2. Did the City Council afford procedural due process to the parties?

The primary concern of KRS 100.211 is due process. In *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005), a zoning decision, the Supreme Court of Kentucky once again defined due process in the administrative context:

> The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed2d 18 (1976) . . . . Procedural due process in the administrative or legislative setting has widely been understood to encompass "a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon the consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action." *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969).

At the November 21, 2005, public hearing held by the City of Hillview, procedural due process was given to the Appellants. Salt River Electric presented testimony from seven (7) individuals with numerous exhibits and the Appellants presented testimony from five (5) individuals with numerous exhibits.

In sum, the Appellants received two public hearings, one before the Planning Commission and one before the City Council. Furthermore, the Appellants have filed two actions for judicial review, consolidated these actions, and now have this case before this Court. They have had an opportunity to be heard.

Appellants assert that because the Hillview City Council at the November 21, 2005, hearing did not allow Mr. James Conway (spouse of one of the Appellants) to voir dire the City Council, the hearing was not valid. They base the claim on *Osborne v. Bullitt County Board of Education*, 415 S.W.2d 607 (Ky.App. 1967). However, we must distinguish this fact situation from the one found in the aforementioned case. *Osborne* is a case involving a teacher's employment and its review by a school board. The Court, therein, specifically excludes its impact on administrative cases:

> In the case of *Board of Education v. Chattin, Ky.,* 376 S.W.2d 693, we held that, upon appeal, the circuit court was limited to an examination of the record of the proceedings held before the school board. The ruling therein was based upon our holding in *American Beauty Homes Corp. v. Planning and Zoning Commission of Louisville and Jefferson Co., Ky*., 379 S.W.2d 450, in which we held that a judicial review of administrative action should be limited to the question of arbitrariness of the administrative body. We no longer think that the principles enunciated in *American Beauty Homes* should be extended to the problems herein involved. KRS 161.790(6) clearly states that in addition to examining the transcript of the hearing before the Board, the court shall hold additional hearings if this seems advisable and that evidence other than that contained in this transcript may be considered. To restrict the court to consideration of only that which occurred before the Board would be to completely ignore the provisions of this statute. Even

> though a school board is an administrative body, **its functions are not exclusively administrative . . . .** *Id.* at 610. (Emphasis added.)

The case cited by the Appellants refers to actions under KRS 161.790(6) and observes that these hearings are not exclusively administrative.

Here, we have a zoning case, which is an administrative hearing. The judicial review provided for in administrative cases and zoning cases, in particular, is outlined by *American Beauty Homes Corp.* Nowhere does it provide that voir dire of the fact-finding body (City Council members) is a due process requirement in zoning cases.

Appellants claim that because the Hillview officials favored bringing Sabert Corporation to Bullitt County prior to the official rezoning of the property, the officials were biased and that this bias was illegal, thus, rendering the ordinance void. But, impartiality in the zoning context is different than that required in the courts. In *Hilltop Basic Resources, Inc.,* 180 S.W.3d at 467, the Supreme Court held that comments from a Fiscal Court member did not violate Hilltop's due process rights to an impartial jury because legislators can express their general opinions about proposed changes, even if, those proposed changes are about to come before them.

Hence, it appears to this Court that the requirements of due process have been met in this case, and this argument cannot form a basis for reversal.

3. Was the City Council's action supported by substantial evidence?

We will now turn to the issue of whether the City Council's decision was supported by substantial evidence. Appellants contend that the zoning change of the Salt River property does not comply with the Bullitt County's Comprehensive Plan adopted in 1997, and that the passage of Ordinance 2005-18 was not supported by substantial evidence.

KRS 100.213 provides that before a zoning map amendment may be granted, the Planning Commission or respective legislative body (here, the City Council) must find that the requested amendment is in agreement with the comprehensive plan or that the existing zoning classification is inappropriate and that the proposed zoning change is appropriate, or that there have been major changes in the area which substantially alter its basic character.

As stated in *Fritz v. Lexington-Fayette Urban County Government*, 986 S.W.2d 456, 459 (Ky.App. 1998):

> By nature, a comprehensive plan speaks to future development even though it takes into consideration the current land uses. The comprehensive plan . . . can include a current land-use plan or map which the legislative body can zone appropriately. KRS 100.201, 100.203. The comprehensive plan, however, looks beyond current uses, to the future, and is constantly undergoing review. KRS 100.197.

Hence, a comprehensive plan is a guide, which is, based on its purpose, undergoing constant review, and is subject to being changed in light of future development. At bar, initially the Planning Commission determined the comprehensive plan provided for Low Density Suburban Residential and that several area residents

opposed the rezoning based on truck traffic, noise, and possible hazardous chemicals associated with a factory. Then, the Planning Commission found that the proposed zoning changes to the Salt River property did not comply with the comprehensive plan.

Thereafter, **per the ordinance**, the City Council overrode their decision and approved the zoning change based on the information provided by the Planning Commission and the testimony and evidence presented at the public hearing held on November 21, 2005. Ultimately, the City Council found the rezoning met the applicable guidelines and strategies underlying the comprehensive plan.

Pursuant to KRS 100.211(1), the City Council rejected the Planning Commission's recommendation and adopted Ordinance 2005-18 by a majority vote. KRS 100.211(1) provides that "it shall take the majority of the entire legislative body or fiscal court to override the recommendation of the planning commission . . . ." They did so after considering the information submitted by the Planning Commission, after hearing testimony, and after considering evidence presented at the public hearing held on November 21, 2005.

Specifically, the City Council found that areas surrounding the Salt River property are zoned light industrial, including an LG&E substation and TMI Horses and Livestock Trailers, LLC. Additionally, other light industrial zones exist in the immediate area – Brookview Industrial Park, Salt River RECC substation, ProLogis Commercial Park, and the Ben Robards' property. Also the

real estate between East Blue Lick Road, Ferguson Lane and I-65 is predominately light industrial. Furthermore, the Solite Plant, which is on property zoned heavy industrial, is located in the immediate area.

In its findings, the City Council also noted the Planning Commission's referrals to the City of Hillview have found this area generally unsuitable for Low Density Suburban. See the Residential Zoning in the following cases:

> Docket #3005Z-16, Goodwin property on Ferguson Lane;
> Docket #2005Z-46, TMI on East Blue Lick Road;
> Ordinance 2005-11, Decker property on Blue Lick Road;
> Ordinance 99-016, Robards property on East Blue Lick Road;
> Ordinance 99-02, Strange property on East Blue Lick Road;
> Ordinance 98-18, Spalding property on Blue Lick Road.

Additionally, the City Council, in making its decision, heard from Jim Urban, a professional land use planner with Land Design & Development and former administrator with the Oldham County Planning Commission. Mr. Urban testified that the proposed zoning change complied with the comprehensive plan.

Steve Scott, a civil engineer with Mindel Scott & Associates, Inc. also testified at the public hearing. Mr. Scott testified that the road leading to the Salt River property could support the traffic generated by the Sabert plant given the improvements that the City of Hillview had agreed to make. Finally, Gary Ziznewski with the Sabert Corporation, testified during the hearing about the truck traffic, noise, and lack of hazardous chemicals associated with the proposed Sabert

plant. Moreover, at the public hearing, area homeowners had opportunity to present conflicting testimony.

However, if there is substantial evidence on the record to support an action, the existence of conflicting evidence on the same record does not make an action arbitrary. *City of Lancaster v. Trumbo*, 660 S.W.2d 954 (Ky.App. 1983). Substantial evidence is evidence which, when taken alone or in the light of all evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). Furthermore, the court may not substitute its own judgment. It must give deference to the city council and uphold their decision if it "is supported by substantial, reliable, and probative evidence found within the record as a whole." *Hocker v. Fisher*, 590 S.W.2d 342, 344 (Ky.App. 1979).

After a careful review of the record of the circuit court action, we do not differ with the court's finding that the City Council acted within its statutory power to allow a zone change to accommodate light industrial development of the Salt River property. There was substantial evidence presented to the City Council that the rezoning was in compliance with the comprehensive plan.

As such, we agree and reiterate that the court's decision was not arbitrary because the City Council acted within its statutory authority, allowed for due process, and had substantial evidence on the record to make such a decision.

KRS 100.211(7) – NINETY-DAY TIME REQUIREMENT

The statute provides in pertinent part:

> The fiscal court or legislative body shall take final action upon a proposed zoning map amendment within ninety (90) days of the date upon which the planning commission takes its final action upon such proposal.

KRS 100.211(7) requires a legislative body to take final action on a proposed zoning map amendment within ninety days from when the Planning Commission took its final action upon the proposal. Appellants posit that the City Council's passing of Ordinance 2005-18 on June 19, 2006, was outside the ninety-day time period as the Planning Commission's recommendation was issued on November 1, 2005. However, the City Council took final action on the Planning Commission's recommendation when it voted to approve the zoning change for the Salt River property on November 22, 2005, which was within the statutory ninety-day period.

After Appellants filed for judicial review on December 20, 2005, the court made its initial order on June 12, 2006, and found that no appropriate findings of fact were set forth at the November 22, 2005, meeting as statutorily required. The court's order set aside Ordinance 2005-18 and remanded it to the City Council to again consider the Planning Commission's recommendation. On June 19, 2006, the City Council re-passed Ordinance 2005-18 and incorporated specific findings of adjudicative facts. Appellants argue that June 19, 2006, is outside the ninety-day period.

The court in its August 23, 2006, Opinion and Order proffered the following reasoning. The City Council took final action **within** the ninety-day

period on November 22, 2005. The fact that Appellants appealed the City Council's November 22, 2005, action and the court remanded it for further action does not alter the character of the November 22, 2005, date as the date of the final action.

We agree with the court. If the Appellants' position was accurate, it creates the absurd situation where an appealed zoning case could never meet the statutory time limit after judicial review wherein a trial court sent it back for clarification or further action. Furthermore, KRS 100.347(5), statutory direction for the right of appeal in zoning cases, defines final action as "[f]or purposes of this chapter, final action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body." The plain meaning of the statute designates that a final action is the calendar date the vote is taken.

In *Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Company, Inc.,* 969 S.W.2d 691 (Ky. 1998), the Kentucky Supreme Court consolidated appeals from several cases to clarify the ninety-day time limit found in KRS 100.211(7). While the ninety-day time frame is considered mandatory, in the aforementioned case, the Supreme Court interpreted the 90 days to begin to run from receipt of the remanded case. The Supreme Court noted that "KRS 100.211(7) was designed to prevent unnecessary delaying tactics when it established the 90 day limit." *Id*. at 694. It was referring to the legislative bodies not acting after the Planning Commission made a decision in order to frustrate the

efforts of citizens. However, this reasoning demonstrates that citizens cannot sue legislative bodies in order to derail the legislative bodies' efforts to comply with court orders and other remedial actions. This procedural behavior is a misapplication of statutory time limitations, too and based on the fact the zoning decision was remanded to the City Council by the circuit court for adjudicative findings, and its subsequent reenactment, with the necessary findings of fact, do not misuse the statutory time period.

Thus, after considering the extensive record herein and the arguments of the parties we find that the court properly acted in this case.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Bixler W. Howland
Louisville, Kentucky

BRIEF FOR APPELLEES, CITY OF HILLVIEW, KENTUCKY; THE CITY COUNCIL OF HILLVIEW, KENTUCKY:

Mark Edison
Shepherdsville, Kentucky

BRIEF FOR APPELLEE, BULLITT COUNTY JOINT PLANNING COMMISSION:

Louis E. Reinhart, III
Shepherdsville, Kentucky

BRIEF FOR APPELLEE, SALT RIVER ELECTRIC COOPERATIVE CORPORATION:

John W. Wooldridge
Shepherdsville, Kentucky

BRIEF FOR APPELLEE, SABERT CORPORATION:

Eric G. Farris
Shepherdsville, Kentucky

William B. Bardenwerper
Clifford H. Ashburner
Louisville, Kentucky